Filed 7/29/19 P. v. Flores CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO LANDA FLORES, Defendant and Appellant.	A153773 (San Francisco City & County Super. Ct. No. 17005816)

Defendant Francisco Landa Flores appeals from a judgment of conviction, after a jury trial, of one count each of possession for sale of cocaine salt (Health & Saf. Code, § 11351),[1] possession for sale of cocaine base (§ 11351.5), possession for sale of heroin (§ 11351), possession for sale of methamphetamine (§ 11378), and possession of drug paraphernalia (§ 11364, subd. (a)). On appeal, defendant contends the trial court (1) erred in denying his motion to suppress and (2) improperly instructed the jury that the People did not have to prove he knew which specific controlled substance he possessed. We affirm.

Motion to Suppress

Defendant does not dispute that the two police officers who approached him in the bicycle parking area of the BART Civic Center station had sufficient cause to detain him.

[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

Rather, he maintains the officers had no basis for a pat search, and even if they did, the search exceeded the legal bounds of a *Terry*[2] search.

The Evidence Pertaining to the Motion

At the hearing on the motion, BART Police Officer Alex José testified. Officer José was wearing a body camera at the time, and the prosecutor introduced the video recording into evidence (accompanied by a transcription prepared by the defense). Officer José's testimony and the recording established the following:

At around 8 p.m. on an April 2017 evening, Officer José and his partner, Officer Kevin Cook, saw defendant and two men sitting on the floor of the bike rack section of the BART station. This section of the station is partly separated from the rest of the station by frosted glass, and is a known area for narcotics activity. As the officers entered the area, they saw that some type of cloth had been draped over the bike rack, partially concealing the men. The officers also saw syringes, tourniquets, a utility knife, several backpacks, and a butane lighter next to the men. The utility knife was within three feet of defendant. The week before, as part of a BART policing operation, the officers had made 30 arrests for narcotics activity in that same area of the station.

The officers told the men they were being detained for loitering in a known narcotics area. Officer José directed that the men keep their hands out of their belongings and displayed where they could be seen by the officers. Defendant did not comply and began shuffling through one of the backpacks. Officer José repeated the order to stop riffling through the backpack.

The officers asked to see identification and commenced pat searches, conducting searches of the other two men, one at a time, before getting to defendant. In the course of pat searching the other men, the officers found more needles and a pocket knife.

Officer José then asked defendant to stand, saw that he had a pair of scissors attached to a keychain on his person and told him to remove them. Defendant stood up, facing away from Officer José. But instead of putting his hands on his head and

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[2] *Terry v. Ohio* (1986) 392 U.S. 1 (*Terry*).

interlacing his fingers as directed, defendant put his hands together in front of him and began stuffing a black nylon bag down his waistband. Officer José was able to observe this furtive action, as he was looking over defendant's shoulder. Officer José immediately reached down and pulled out the bag, some of which was still sticking out of defendant's waistband. Officer José did not open the bag, but based on his experience, the bag felt as though it contained numerous small packaged items, "consistent with suspected small-packaged narcotics." Officer José immediately told defendant he was "under arrest for loitering" in "a known narcotics area" and "possible possession of a controlled substance." Officer José then seized the two backpacks that were near defendant.

Standard of Review

Our standard of review of a ruling on a motion to suppress is well-established. "[W]e 'uphold those factual findings of the trial court that are supported by substantial evidence.' (*People v. Camacho* (2000) 23 Cal.4th 824, 830. . . .) We independently review the question whether the challenged search conformed to constitutional standards of reasonableness. [Citation.] Our review is governed by federal constitutional standards." (*People v. Williams* (2017) 15 Cal.App.5th 111, 120.) Additionally, "[i]n reviewing the denial of a motion to suppress, we examine 'the record in the light most favorable to the trial court's ruling.' " (*People v. Turner* (2013) 219 Cal.App.4th 151, 159, quoting *People v. Jenkins* (2000) 22 Cal.4th 900, 969.)

The Search Was Lawful

A search conducted without a warrant is presumed illegal unless it comes within an exception to the general rule that warrantless searches are per se unreasonable. (*People v. Fay* (1986) 184 Cal.App.3d 882, 891 (*Fay*).) One exception to the warrant requirement is a protective search for weapons incident to a lawful detention. (*People v. Medina* (2003) 110 Cal.App.4th 171, 176.) "In the case of the self-protective search for weapons, [the police officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." (*Sibron v. New York* (1968) 392 U.S. 40, 64 (*Sibron*); *Medina,* at p. 176.) The search must be limited to the

outer clothing and to what is necessary to discover weapons. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373, 375.) However, any object found by sight or touch during a search, within the scope of a *Terry* frisk, may be seized so long as the officer has probable cause to believe it is contraband. (*Dickerson*, at pp. 374–375; *People v. Lee* (1987) 194 Cal.App.3d 975, 983 (*Lee*).)

A search incident to a lawful arrest is another exception to the general rule, permitting the seizure of weapons and evidence on the arrestee's person or within his immediate reach; such a search is justified by the need to prevent the disappearance or destruction of evidence of a crime. (*Fay, supra*, 184 Cal.App.3d at p. 891.) A search incident to an arrest may precede the arrest. (*Ibid.*; *People v. Ingle* (1960) 53 Cal.2d 407, 413; see *People v. Macabeo* (2016) 1 Cal.5th 1206, 1218 (*Macabeo*) ["When a custodial arrest is made, and that arrest is supported by independent probable cause, a search incident to that custodial arrest may be permitted, even though the formalities of the arrest follow the search."].) "The crucial point is whether probable cause to arrest existed prior to the search. . . ." (*Fay*, at p. 892.) Probable cause has been generally defined as a state of facts that "would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." (*Ingle*, at p. 412.) Probable cause is a "fluid concept—turning on the assessment of probabilities in particular factual contexts. . . ." (*Illinois v. Gates* (1983) 462 U.S. 213, 232.)

In the trial court, the prosecutor maintained that the search was lawful as a search incident to arrest, and even if the court concluded probable cause to arrest was not present at the time of the search, the search was permissible under *Terry*. Without discussing whether the search was permissible as a search incident to an arrest, the court found there was sufficient basis for a pat search—"there [were] articulable facts that [defendant] could have been armed and dangerous"—and once the officer pulled the bag from defendant's waistband, there was probable cause to arrest. In his briefs on appeal, defendant addresses only whether the search was permissible under *Terry*, and the Attorney General responds only on that issue.

Permissible Pat Search

The trial court correctly concluded the circumstances were such to permit a protective pat search. The area was a known narcotics area. The week before, BART police had made 30 arrests in the area for drug offenses. The two officers were outnumbered. There were syringes and drug paraphernalia on the ground by the men. There was a utility knife within reach. There were several backpacks. Defendant reached into one after the officers instructed the men to keep their hands in sight. Defendant had scissors clipped to his person. And the pat searches of the other two men produced more needles and a pocket knife. Under these circumstances, the officers were justified in conducting protective pat searches. (See *People v. Collier* (2008) 166 Cal.App.4th 1374, 1377–1378 [where officer smelled marijuana, suspected transportation of drugs, and defendant had baggy clothing, there were "specific and articulable facts" to conduct a pat search]; *People v. Limon* (1993) 17 Cal.App.4th 524, 535 (*Limon*) [officer had "objectively reasonable belief that defendant might be armed and dangerous" based on "combination of the officer's knowledge of the prevalence of drugs and weapons in the area, the propensity of drug dealers to have weapons, and the other evidence . . . justifying defendant's detention for selling drugs"].) As the court in *Collier* observed, the " '[j]udiciary should not lightly second-guess a police officer's decision to perform a patdown search for officer safety.' " (*Collier,* at p. 1378.)

Citing *Ybarra v. Illinois* (1979) 444 U.S. 85, defendant maintains the trial court "erred as a matter of law" in stating the knife and paraphernalia found on the other two men "added to sufficient, articulable facts to conduct a pat search" of defendant. As defendant observes, the Supreme Court stated in *Ybarra* that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." (*Id.* at p. 91.) Thus, in *Ybarra*, the mere fact officers had a warrant to search a tavern was not sufficient to support the pat search of the defendant who happened to be inside; the search "was simply not supported by a reasonable belief that he was armed and presently dangerous." (*Id.* at pp. 91–93.)

The officers here, however, did not detain and pat search defendant merely because he happened to be in the company of two other men. On the contrary, the officers had multiple reasons for detaining and pat searching *each* of the men, including defendant.

Defendant's reliance on *Sibron* is also misplaced. In that case, over the course of eight hours, an officer observed the defendant in conversation with a number of known addicts. The officer did not see anything change hands, nor did he hear what was said. (*Sibron, supra*, 392 U.S. at pp. 62–63.) Eventually the defendant went into a restaurant, the officer entered, and the two then went outside, where the defendant was searched. (*Id.* at pp. 45, 63.) The high court concluded the officer had not identified any "particular facts from which he reasonably inferred [the defendant] was armed and dangerous." (*Id.* at p. 64.)

The circumstances here are markedly different. The BART officers did not simply observe defendant talking with other individuals. Rather, in a known narcotics area, they came upon a scene with evidence of illicit drug activity by all three men and supporting pat searches of all three, which became even more justified as to defendant when he refused to follow the officer's instructions and then attempted to secrete a package down the front of his pants.

Defendant further complains that in reaching over defendant's shoulder and pulling the black bag out of his waistband, Officer José exceeded the permissible scope of a *Terry* search. While defendant suggests this act preceded the pat search, that is not the case. Officer José commenced the search by asking defendant to stand and put his hands on his head with his fingers interlaced. Instead of doing so, defendant brought his hands together and began to stuff the black bag down his waistband. As we have pointed out, an officer may seize any object found by sight or touch during a pat search, so long as the officer has probable cause to believe it is contraband. (See *Lee, supra*, 194 Cal.App.3d at pp. 984–985.) Here, Officer José immediately believed the bag contained contraband—a belief imminently reasonable under the circumstances. In short, the bag was properly seized during the pat search as suspected contraband.

Search Incident to Arrest

While the trial court did not comment on the prosecution's first justification of the search—that it was a search incident to an arrest—we are not bound by the lower court's reasoning and can consider this ground for upholding the search. (See *People v. Dibb* (1995) 37 Cal.App.4th 832, 837 (*Dibb*).) Moreover, there is absolutely no doubt the search of defendant and seizure of the black bag was permissible as a search incident to arrest.

"When a custodial arrest is made, and that arrest is supported by independent probable cause, a search incident to that custodial arrest may be permitted, even though the formalities of the arrest follow the search." (*Macabeo, supra*, 1 Cal.5th at p. 1218.) So long as "the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa," so long as the fruits of the search do not contribute to the probable cause to arrest. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111.) In other words, evidence seized during a search occurring immediately prior to an arrest will not be suppressed as long as there was probable cause to arrest *at the time of the search* based on evidence *independent of that seized* during the search. (See *Dibb, supra*, 37 Cal.App.4th at pp. 836–837 [relevant question was whether, given totality of circumstances, officer had probable cause to arrest the defendant based solely on the officer's initial feel of the object, thus rendering officer's subsequent removal of the object from under the defendant's clothing a search incident to arrest]; *Limon, supra*, 17 Cal.App.4th at p. 538 ["An officer with probable cause to arrest can search incident to arrest before making the arrest."]; *Lee, supra*, 194 Cal.App.3d at pp. 984–985 [officer's immediate "definite identification of the object as contraband" during pat search was sufficient to justify officer's seizure of narcotic filled "balloons"]; cf. *People v. Valdez* (1987) 196 Cal.App.3d 799, 806 [to justify search as incident to arrest under *Lee*, officers must have probable cause to arrest prior to reaching under clothing during pat search].)

Here, the officers had probable cause to arrest defendant the moment they entered the bike storage area and saw the evidence of drug usage strewn about, the backpacks,

and the material draped on the rack to shield the three men from view, particularly given that the officers knew the area was a drug locale and further knew 30 arrests had been made the week before. On this basis, alone, the search that followed, in conjunction with defendant's immediate arrest thereafter on *both* loitering and possession offenses, was permissible as a search incident to arrest. The officers had further probable cause to arrest defendant when he refused to put his hands on his head and, instead, used them to stuff the black bag down his waistband. Given all the other circumstances of which the officers were aware at that point in time, that act of subterfuge gave rise to further probable cause to arrest defendant for possession of narcotics and/or drug paraphernalia. Accordingly, the search was also permissible as a search incident to arrest on this basis. (See *Limon, supra*, 17 Cal.App.4th at p. 538 ["discovery of the hide-a-key box in defendant's pocket" along with other circumstances "indicating that what defendant was exchanging and concealing was drugs" established probable cause to arrest, rendering prearrest search lawful as search incident to arrest].)

In sum, the trial court properly denied defendant's motion to suppress.

Instruction with CALCRIM No. 2302

The court instructed the jury with CALCRIM No. 2302 on the elements of possession of a controlled substance for sale. The court read all four of the optional sentences that may be given in conjunction with the core instruction, including the sentence that provides "[t]he People do not need to prove that the defendant knew which specific controlled substance he possessed."[3] Defendant challenges the legality of this optional sentence.

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[3] CALCRIM No. 2302 (Possession for Sale) provides, in pertinent part, "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1.The defendant [unlawfully] possessed a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance's nature or character as a controlled substance; [¶] 4. When the defendant possessed the controlled substance, (he/she) intended (to sell it/[or] that someone else sell it); . . . [¶] 5A. The controlled substance was <insert type of controlled substance>; [¶] . . . [¶] 6. The controlled substance was in a usable amount. [¶] . . . [¶] [The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.] [¶] [Two or more people may

The Attorney General claims defendant forfeited the issue not only by failing to object, but because his counsel seemingly agreed with the trial court's extended discussion as to why the instruction, as augmented, was warranted. However, where, as here, a defendant challenges an instruction on the ground it erroneously states the law, the error is not forfeited by failing to object. (See *People v. Fiore* (2014) 227 Cal.App.4th 1362, 1377–1378.)

"We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. [Citation.] Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

Defendant acknowledges that a "trilogy of earlier cases" supports the challenged sentence of the CALCRIM instruction: *People v. Romero* (1997) 55 Cal.App.4th 147, 151–157 [defendant's mistaken belief that substance was marijuana and not cocaine was not a defense]; *People v. Guy* (1980) 107 Cal.App.3d 593, 600–601 [only knowledge necessary to support possession conviction is knowledge of the "controlled nature" of the substance]; and *People v. Garringer* (1975) 48 Cal.App.3d 827, 834–835 [same]. (See *People v. Montero* (2007) 155 Cal.App.4th 1170, 1177 [CALCRIM No. 2302 "captures

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possess something at the same time.] [¶] [A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/[or] the right to control it), either personally or through another person.] [¶] [Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]."

all of the elements of the crime of possession for sale" and "correctly states the elements of possession and knowledge in a manner reasonable jurors are able to understand"].)

Defendant asserts, however, these cases either were "disapproved sub silentio" in *People v. Coria* (1999) 21 Cal.4th 868 (*Coria*), or "were wrongly decided in light of *Coria*." Neither is the case.

The issue before the court in *Coria, supra*, 21 Cal.4th at page 874, was whether a mens rea is required for a manufacturing conviction, or whether manufacturing is effectively a "strict liability crime." The defendant claimed that while he was aware he was "washing" cold tablets to extract pseudoephedrine, he was not aware he was part of a process manufacturing methamphetamine; rather, he thought the tablets were being salvaged and resold as a "fat loss, muscle sparing agent." (*Id.* at p. 873.) The jury was instructed, based on a prior Court of Appeal opinion, that the prosecution did not have to prove the defendant was aware he was helping to manufacture a controlled substance. (*Id.* at p. 874.) The high court reversed, concluding "there is no reason in law or logic to construe section 11379.6 as a strict liability offense and thus permit the conviction of a person for manufacturing methamphetamine, a felony, for extracting pseudoephedrine from pills if the person does not know the extraction was performed for the purpose of, or as part of the process of, manufacturing methamphetamine." (*Id.* at p. 880.)

CALCRIM No. 2302 does not dispense with the requirement that the defendant know he or she is in possession of a controlled substance. Rather, the challenged sentence of the instruction simply provides that a defendant need not know *which specific* controlled substance he or she happens to possess at the time. In other words, the challenged CALCRIM sentence does not make the crime of possession for sale a matter of strict liability wherein the defendant is liable regardless of whether he or she was aware they possessed a controlled substance. Indeed, defendant cites no case that remotely suggests the *Romero* trilogy of cases is no longer good law. Nor has he cited any case that has questioned the validity of the challenged sentence of the CALCRIM instruction.

Defendant additionally complains that the challenged sentence of the CALCRIM instruction "negated [his] testimony that he did not know what was in the backpack," and thus violated his due process rights because it relieved the prosecution of proving every necessary fact to prove the charged crimes. We are hard pressed to follow this argument as the jury was expressly instructed that the prosecution was required to prove that defendant knew of the "substance's nature or character as a controlled substance." (CALCRIM No. 2302.) Defendant's claim that he "did not know" what was in his backpack simply put the prosecution to the task of proving otherwise—that is, proving beyond a reasonable doubt that defendant was fully aware that he was in possession of controlled substances and that he possessed these substances for sale. The prosecution also put on an overwhelming case in this regard. Among other evidence, defendant's backpack and black nylon bag were filled with hundreds of individually wrapped bundles of cocaine, heroin, and methamphetamine—*all* of which are controlled substances and all of which were packaged in amounts typical of drugs for sale.

DISPOSITION

The judgement is affirmed.

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Banke, J.

We concur:

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Humes, P.J.

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Sanchez, J.

A153773, *People v. Flores*